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No. 91-1704

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

OVERSEAS MOTORS, INC.,

Petitioner,

v.

MIROLJUB MITKOVSKI,
and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT MIROLJUB MITKOVSKI'S BRIEF IN OPPOSITION AND TO THE BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Respondents Miroljub Mitkovski and the National Labor Relations Board (the "Board") have filed briefs in opposition to Petitioner Overseas Motors, Inc.'s ("Overseas Motors") Petition for a Writ of Certiorari on different and confusing grounds that mistake the important policy questions involved in this case and leave one wondering how it can be argued that anyone, such as Mr. Mitkovski, who has deliberately committed *perjury* before an instrumentality of the Federal government should be awarded full backpay in the amount of $93,648.73 for his actions. Equally incredible is the Board's complete lack of interest in safeguarding the integrity of its own processes as manifested not only by its characterization of this matter as a simple fact dispute, but by its own participation in Mr. Mitkovski's subornation of perjury. As unbelievable as it may seem,

Counsel for the General Counsel, representing the Board during the backpay proceedings, had in its possession and failed to disclose conclusive evidence in the form of affidavit testimony that Mr. Mitkovski perjured himself at the initial backpay hearing, and planned to and did perjure himself at the second backpay hearing as well, and that all or certain of the loans which Mr. Mitkovski claimed to use for his living expenses during the backpay period were not valid, but that they were a sham contrived by Mr. Mitkovski and intended to defraud Overseas Motors. Faced with the adjudication of a matter by a process so tainted with perjury and impropriety, it is easy to understand why Overseas Motors sought relief in Federal district court, notwithstanding Mr. Mitkovski's mean and unjustified characterization of this desperate effort by Overseas Motors to secure justice as "frivolous."

In Section 10(c) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 160(c), Congress empowered and directed the Board, upon finding that an unfair labor practice has been committed, to issue:

> ". . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without backpay, as will effectuate the policies of this Act. . . ."

Congress naturally expected the Board to undertake the responsibility delegated to it and affirmatively uphold and further the policies of the Act. By permitting discriminatees to commit perjury with impunity and by participating in the subornation of that perjury, the Board has failed to effectuate the policies of the Act.

The affidavits evidencing Mr. Mitkovski's perjury, that were sent anonymously to Overseas Motors, were taken by the Board itself after the original backpay hearing and prior to the proceedings on remand by Mr. Jerome

Schmidt, Counsel for the General Counsel. On July 29, 1987, Mr. Schmidt wrote to John F. Falcone, Assistant General Counsel, Division of Operations Management, expressing grave concern over the veracity of Mr. Mitkovski's statements and essentially giving his opinion that this evidence must be furnished to the administrative law judge. Mr. Schmidt told Mr. Falcone in his letter that:

> "If we're to excuse or justify the [Charging Party's] alleged solicitation of false testimony, justice is undermined as a basic premise of the system is [sic] that we don't bear false witness. If we try to excuse false testimony or the solicitation thereof, we no longer have ethical standards but 'situation ethics' under which the judicial system can't function."

Mr. Schmidt further advised Mr. Falcone that he was unable to verify the existence of the money given to Mr. Mitkovski in connection with the loans. The Board failed to act on this evidence of perjury. Not until the evidence was anonymously sent to Overseas Motors and Overseas Motors demanded further hearings did the Board capitulate. Ironically, these additional proceedings were held before the Honorable Robert W. Leiner, the same administrative law judge who had presided over the previous two backpay hearings, and who, when questioned by Overseas Motors counsel, acknowledged that he too had received the evidence of Mr. Mitkovski's perjury and not acted upon it, claiming that when he opened it and saw what it was he simply passed it along to the Board without reading it. Where is the due process to which Overseas Motors is entitled?

Respondents Mr. Mitkovski and the Board argue that this case is simply a disagreement over a few facts that is properly left to the lower courts, but it is not. There

are no facts in dispute. Even Judge Leiner determined that:

1. Mr. Mitkovski's expenses exceeded his income during the backpay period;

2. Mr. Mitkovski failed to account for the discrepancy between his expenses and his income; and

3. Mr. Mitkovski perjured himself and attempted to suborn the perjury of witnesses at the backpay hearing in an effort to increase his recovery.

Judge Leiner simply drew the inference that Mr. Mitkovski did not conceal interim earnings. The Board drew the inference that he did and based upon the Board's Brief in Opposition to Overseas Motors' Petition the Board has apparently not changed its position in this regard. There is no credibility issue involved here which requires the observation of any witness's demeanor. Thus, the Board's determination should not have been overturned by the Court of Appeals unless, in applying the rule of *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), the Court determined that the Board's decision was not supported by substantial evidence. At best, the Court of Appeals misapplied this rule by concluding that the Board improperly overturned the decision of the administrative law judge because the administrative law judge's decision was supported by substantial evidence.

The Board, in its Brief in Opposition to Overseas Motors' Petition, interprets the decision of the Court of Appeals to provide that Mr. Mitkovski's perjury in attempting to inflate the value of the loans did not impeach the credibility of his testimony respecting his efforts to obtain additional interim employment. If this is the basis of the decision of the Court of Appeals, then it must clearly be overturned so that this matter can be remanded to the Board because the Board never

made a determination as to whether Mr. Mitkovski had properly sought to mitigate his damages by seeking interim employment. Arguably, the Court of Appeals was of the view that since Judge Leiner had discussed the mitigation issue and the Board had denied backpay it had necessarily considered the mitigation issue itself. However, a fair reading of the Board's decision discloses that it did not reach the mitigation issue. Moreover, the Court of Appeals is not free to circumvent the Board's jurisdiction to make the initial determination on the merits. It is incompatible with the orderly function of the process of judicial review to permit otherwise. *NLRB* v. *Metropolitan Life Insurance Company*, 380 U.S. 438, 443 (1965).

Mr. Mitkovski argues that the Board has "no business" denying all backpay to a discriminatee who has committed and suborned perjury. In support of this argument, reference is made to *Ad Art Inc.*, 280 NLRB 985 (1986). However, what Mr. Mitkovski does not indicate is that the reference is simply to a concurring decision filed by Member Stephens. There is another concurring decision that was filed by Chairman Dotson which much more closely reflects the Congressional mandate imposed upon the Board to effectuate the policies of the Act. Speaking of claimants who fraudulently conceal interim earnings, Chairman Dotson stated:

> "Although I consider the denial of backpay to such claimants to be mandated by the status quo ante principles underlying the Board's remedial processes, I am compelled to note that a denial of backpay in all cases of willful concealment most forcefully and effectively serves to promote the integrity of the Board's compliance processes by discouraging claimants from contemplating the concealment of interim earnings. While I have no doubt that the vast majority of

> claimants would never seriously consider the fraudulent concealment of interim earnings, those few who may entertain such a notion are far less likely to engage in such misconduct if faced with the certain denial of all backpay on discovery of willful concealment. Similarly, the achievement of greater public confidence in the integrity of our compliance processes and in the accuracy of backpay specifications is far more likely to increase voluntary compliance by respondents short of litigation. In times of budgetary restraint and limited resources prompt settlement of often complex backpay cases can only serve as an aid in carrying out the mission of this Agency." [footnotes omitted]

In light of the Board's confusion over its mandate from Congress and its failure to uphold even a minimum level of integrity over its adjudicative processes, the need for review of the action below is indisputable; indeed, Petitioner suggests that summary reversal is proper and just now in order to demonstrate that perjury before Federal agencies will not be tolerated under the laws of this land.

Respectfully submitted,

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